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## The Right of the Child to be Raised in a Family Around the Current Issues

**Keywords:** family, the right of the child to be raised in a family, the family sovereignty, the subsidiarity principle, the Charter of the Rights of the Family, the Convention on the Rights of the Child

### 1. “Sign of the times”:

The horizon of the contemporary humanization mission  
of the family

Twenty-five years ago Pope John Paul II, in no. 40 of the post-synodal *Apostolic Exhortation* “*Christifideles laici*,” conducted a peculiar reassumption of the postconciliar teaching of the Church on family — with reference to the major works of his *opus magnum*: the *Familiaris consortio* exhortation (1981) and the Charter of the Rights of the Family (1983), prepared by the Holy See. What remains its testimony is the famous sentence: “[...] the family is the basic cell of society. It is the cradle of life and love, the place in which the individual ‘is born’ and ‘grows’.”<sup>1</sup> It turns out that nowadays the aftermath of the Pope-great humanist thought can be easily recognized in the words of the document which prepares the next session of the Synod of Bishops (October 5—19, 2014): “The beauty of the biblical message on the family has its roots in the creation of man

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<sup>1</sup> JOHN PAUL II: *Apostolic Exhortation* “*Christifideles laici*” (December 30, 1988), [henceforth: ChL], no. 40.

and woman, both made in the image and likeness of God (cf. Gen 1:24—31; 2:4—25). Bound together by an indissoluble sacramental bond, those who are married, experience the beauty of love, fatherhood, motherhood, and the supreme dignity of participating in such way in the creative work of God. In the gift of the fruit of their union, they assume the responsibility of raising and educating other persons for the future of humankind. Through procreation, man and woman fulfil, in faith, the vocation of being God's collaborators in the protection of creation and the growth of the human family."<sup>2</sup> It is difficult not to notice that what comes up in the former and the latter text is the truth that the social function of the family constitutes a constitutive and a foreground dimension of its mission.<sup>3</sup> This is reflected in cardinal Peter Erdö's commentary<sup>4</sup> to the quoted "Preparatory Document," and more precisely the place, where the important — in the evangelization work aimed at promotion of dignity of matrimony and family — where the passage from the Conciliar Pastoral Constitution on the Church is evoked: "[...] the family, in which the various generations come together and help one another grow wiser and harmonize personal rights with the other requirements of social life, is the very foundation of society."<sup>5</sup> According to an outstanding canonist, this single sentence — in the contemporary, marked with the stamp of individualism,<sup>6</sup> epoch of a crisis of the institution of marriage and

<sup>2</sup> SYNOD OF BISHOPS. EXTRAORDINARY GENERAL ASSEMBLY: *Pastoral Challenges to the Family in the Context of Evangelization. Preparatory Document*. Vatican City 2013.

<sup>3</sup> Augusto Sarmiento, moral theology professor at the University of Navarra in Pamplona, an outstanding expert specializing in issues related to marriage and family, devoted, among others, an interesting monograph to the substantiation of this thesis — A. SARMIENTO: *Al servicio del amor y de la vida: el matrimonio y la familia*. Madrid 2006.

<sup>4</sup> P. ERDÖ: "Osservazioni sotto l'aspetto canonistico-pastorale sul 'documento preparatorio' della III Assemblea Generale Straordinaria del Sinodo dei Vescovi." In: *Conferenza stampa sulla preparazione della III Assemblea Generale Straordinaria del Sinodo dei Vescovi, 05.11.2013* — <http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2013/11/05/0722/01618.html> (accessed 30.6.2014).

<sup>5</sup> VATICAN COUNCIL II: *Pastoral Constitution on the Church "Gaudium et spes"* [henceforth: GS], n. 52,2; SYNOD OF BISHOPS. EXTRAORDINARY GENERAL ASSEMBLY: *Pastoral Challenges to the Family...*, p. 3.

<sup>6</sup> Let us recall the fact that John Paul II perceived individualism as the origin of contemporary threats to the civilization of love, the part of which is the family — JOHN PAUL II: *Letter to Families "Gratissimam sane"* (February 2, 1994) [henceforth: GrS], n. 14. Today, Pope Francis — similarly — looks for the reason of the fact that "the family is experiencing a profound cultural crisis," in the individualism ("of our postmodern and globalized era") that "favours a lifestyle, which weakens the development and stability of personal relationships and distorts family bonds" — FRANCIS: *Apostolic Exhortation "Evangelii gaudium"* (November 24, 2013) [henceforth: EG], nos. 66, 67.

family<sup>7</sup> — constitutes a compass pointing towards a common construction/reconstruction (owing to an effort made by the entire societies, with an indispensable participation of civil authorities) of the impaired bonds and intergenerational solidarity, with a view to securing for the family the function of a “rock” — a fundamental institution of the human society.<sup>8</sup>

It is clearly visible how this fresh interpretation of the “sign of the times”<sup>9</sup> corresponds with John Paul II’s concern expressed 25 years ago, in which he appealed to all people of goodwill: “Required [...] is a vast, extensive and systematic work, sustained not only by culture but also by economic and legislative means, which will safeguard the role of family in its task of being the *primary place of ‘humanization’* for the person and society.”<sup>10</sup> The voice of the international spiritual authority reverberates even more loudly, when the words calling for a need of firm endeavours, not to let the social awareness of the fact that the family is the first and elementary social unit and fulfils a completely irreplaceable role in the society diminish, are addressed: “the family can and must require from all, beginning with public authority, the respect for those rights which in saving the family, will save society itself.”<sup>11</sup> Indeed, the subject matter of the message embedded in the last words of the above-mentioned no. 40 of *Christifideles laici* is surprising, when it turns out — it is worth emphasizing it now, on the eve of the assembly of the Synod, the aim of which is, after all, to intensify the evangelization effort to the benefit of the family — how this John Paul II’s appeal preserved its timeliness: “As experience testifies, whole civilizations and the cohesiveness of peoples depend above all on the human quality of their families. For this reason the duty in the apostolate towards the family acquires an incomparable social value. The Church, for her part, is deeply convinced of it, knowing well that ‘the path to the future passes through the family’.”<sup>12</sup>

<sup>7</sup> In the monograph *Matrimonio y familia. Iniciación Teológica* reputable canonists Jorge Miras and Juan Ignacio Bañares — after synthetical albeit instructive remarks concerning the sources of the contemporary marriage and family crisis (with an emphasized destructive impingement of the *gender* ideology, in the chapter entitled *Matrimonio y familia bajo la presión cultural*) — accurately defined the “keys” to the understanding of the mentioned crisis: a) *el rechazo del realismo*, b) *el positivismo jurídico*, c) *el relativismo moral y el individuo como absoluto*, d) *la libertad como pura opción* — J. MIRAS, J.I. BAÑARES: *Matrimonio y familia. Iniciación Teológica*. Madrid 20072, pp. 22—32.

<sup>8</sup> P. ERDÖ: “Osservazioni...,” n. 3.

<sup>9</sup> Cf. A. PASTWA: “Normy kodeksowe dotyczące małżeństwa a wyzwania współczesności.” In: „*Hodie et cras*” — *dziś i jutro Kodeksu Prawa Kanonicznego z 1983 roku 30 lat po promulgacji*. Ed. K. BURCZAK. Lublin 2014, pp. 49—66.

<sup>10</sup> ChL, no. 40

<sup>11</sup> Ibidem.

<sup>12</sup> Ibidem.

Therefore, if based on the papal magisterium, we assume that the social function defines the nucleus of the mission of the family,<sup>13</sup> then the conclusion that emerges — according to an marriage expert Augusto Sarmiento — is obvious. This well-known Spanish theologian, inspired by the profoundness of the papal teaching in *Familiaris consortio* — especially by the articulations of the exhortation included in the titles of points 37 and 43: “Educating in the Essential Values of Human Life” (with an important message that the family is “the first and fundamental school of social living”<sup>14</sup>) and “Family Life as an Experience of Communion and Sharing” (with the first sentence of key importance: “the very experience of communion and sharing [...] represents its first and fundamental contribution to society”<sup>15</sup>) — does not hesitate to propose a thesis which suggests that in this magisterium lecture one issue is of central and utmost importance: the fundamental role of the family is a service to the benefit of life<sup>16</sup>; it is precisely this assignment that the human humanization mission<sup>17</sup> — so strongly emphasized by Pope Wojtyła — is inseparably and inescapably connected with.

Indeed, the humanization mission constitutes an essential feature and one of the main determinants of *institutum familiae*.<sup>18</sup> Since the task of every family — “an educating community” — is to: help a human being from the very beginning with identifying his own calling or prepare him for undertaking interpersonal relationships, based on justice and love.<sup>19</sup> Naturally, it concerns a family community initiated by the matrimonial covenant<sup>20</sup> — according to a paradigm clearly defined in the canonical legal order: exclusiveness of the family model based on natural marriage, a model the parameters of which are fastness and stability (here I agree with Paolo Moneta: *la famiglia fondata sul matrimonio naturale, quale*

<sup>13</sup> Cf. A. SARMIENTO: *Al servicio del amor...*, p. 276.

<sup>14</sup> FC, no. 37.

<sup>15</sup> FC, no. 43.

<sup>16</sup> “Fundamental duties are, therefore, incumbent on the family, the generous exercise of which cannot but enrich deeply those who are mainly responsible for the family itself, making them more direct collaborators with God in the formation of new men” — JOHN PAUL II: *Address to Young People Gathered in the Vatican Basilica* (January 3, 1979) — [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/speeches/1979/january/documents/hf\\_jp-ii\\_spe\\_19790103\\_basilica-vaticana\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/speeches/1979/january/documents/hf_jp-ii_spe_19790103_basilica-vaticana_en.html) (accessed 30.6.2014).

<sup>17</sup> Cf. A. SARMIENTO: *Al servicio del amor...*, p. 277.

<sup>18</sup> “The family is [...] the place of origin and the most effective means for humanizing and personalizing society: it makes an original contribution in depth to building up the world, by making possible a life that is properly speaking human, in particular by guarding and transmitting virtues and ‘values’” — FC, no. 43.

<sup>19</sup> FC, no. 2.

<sup>20</sup> GrS, no. 7.

*modello esclusivo di particolare saldezza e stabilità*<sup>21</sup>). In turn, to understand the specificity (uniqueness) of the phenomenon of the Christian family<sup>22</sup> — in the light of the truth regarding the sacramental character of marriage (containing the spouses' love in the Christ's betrothed-redemptive love) means to perceive the family as "the first community called to announce the Gospel to the human person during growth and to bring him or her, through a progressive education and catechesis, to full human and Christian maturity."<sup>23</sup> Within this context the conclusion put forward by Augusto Sarmiento's research on the family as a "school of social living" (and at the same time "school of deeper humanity"<sup>24</sup>) seems completely just. He believes that not all forms of family life serve the human humanization and participate in the development of the society. A family, in order to create the integral human well-being — and that is, in fact, what the humanization is about — should act in a manner respecting this set of goods and values, which characterize it as a "community of life and love."<sup>25</sup>

### The subject matter criteria of the Charter of the Rights of the Family (October 22, 1983)

Recently, an outstanding canonist, authority in the field of the church matrimonial and family legislation, bishop Antoni Stankiewicz<sup>26</sup> raised an issue of the cognitive values of a slightly forgotten — *nota bene* published on the Vatican websites, only in the Italian original version — John Paul II's 1986 allocution *Sono lieto*. The opportunity to deliver it was the 6th Colloquium on Juridical Studies held in Rome and organized by the

<sup>21</sup> P. MONETA: "Stabilità della famiglia e sua tutela." In: *Tutela della famiglia e diritto dei minori nel codice di diritto canonico*. [Atti del XXIX Congresso Nazionale di Diritto Canonico Canonico, Trieste 7—10 Settembre 1998]. Studi Giuridici. Vol. 53. Città del Vaticano 2000, p. 37.

<sup>22</sup> See G. LO CASTRO: "Famiglia e matrimonio nella temperie della modernità." In: *Tutela della famiglia...*, pp. 18—20.

<sup>23</sup> FC, no. 2.

<sup>24</sup> GS, no. 52,1.

<sup>25</sup> A. SARMIENTO: *Al servicio del amor...*, pp. 278—279.

<sup>26</sup> A. STANKIEWICZ: "Familia e filiazione in diritto canonico." In: "*Finis legis Christus*". *Księga pamiątkowa dedykowana ks. prof. W. Góralskiemu z okazji 70. rocznicy urodzin*. Eds. J. WROCEŃSKI, J. KRAJCZYŃSKI. Vol. 1. Warszawa 2009, pp. 187—188.



Utriusque Iuris Pontifical Institute (April 26, 1986) in cooperation with the Pontifical John Paul II Institute for Studies on Marriage and Family of the Pontifical Lateran University entitled *La famiglia e i suoi diritti nella comunità civile e religiosa*.<sup>27</sup> The family and its foundation: marriage — John Paul II teaches — are institutions to the benefit of which the civil and religious society should invariably serve. After all, it is about institutions ingrained in nature, that is, in the same human-person ontology, the real individual welfare of which always goes hand in hand with the welfare of the entire society.<sup>28</sup>

There is no escaping the question how to execute this ambitious cooperation “programme,” when one of the main problems of our times, influencing the relations between the state and the Church, is the axiological confusion present in the public discourse, and on the contemporary “agorae” very popular are ideas undermining the moral order (or even creating “new morals”)<sup>29</sup> — among them is the “subversive” thesis suggesting the existence of an antinomy between: nature and freedom,<sup>30</sup> nature and culture. Naturally, a particular vocation to give the lie to similar statements rests with the Church. However, it is necessary to add that there is nothing that can substitute a well-thought out positive message — an affirmation of the priceless value of marriage and family on the ground

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<sup>27</sup> JOHN PAUL II: *Discorso ai partecipanti al VI Colloquio Giuridico organizzato dal Pontificio Istituto «Utriusque Iuris» “Sono lieto”* (April 26, 1986) — [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/speeches/1986/april/documents/hf\\_jp-ii\\_spe\\_19860426\\_giuristi\\_it.html](http://www.vatican.va/holy_father/john_paul_ii/speeches/1986/april/documents/hf_jp-ii_spe_19860426_giuristi_it.html) (accessed 30.6.2014).

<sup>28</sup> Ibidem, no. 2.

<sup>29</sup> See „Mężczyznę i niewiastę stworzył ich”. *Afirmacja osoby ludzkiej odpowiedzią nauk teologicznych na ideologiczną uzurpację genderyzmu*. Ed. A. PASTWA. Katowice 2012.

<sup>30</sup> Let us recall an important passage of *Veritatis splendor*: “For some, ‘nature’ becomes reduced to raw material for human activity and for its power: thus nature needs to be profoundly transformed, and indeed overcome by freedom, inasmuch as it represents a limitation and denial of freedom. For others, it is in the untrammelled advancement of man’s power, or of his freedom that economic, cultural, social and even moral values are established: nature would thus come to mean everything found in man and the world apart from freedom. In such an understanding, nature would include in the first place the human body, its make-up and its processes: against this physical datum would be opposed whatever is ‘constructed’, in other words ‘culture’, seen as the product and result of freedom. Human nature, understood in this way, could be reduced to and treated as a readily available biological or social material. This ultimately means making freedom self-defining and a phenomenon creative of itself and its values. Indeed, when all is said and done man would not even have a nature; he would be his own personal life-project. Man would be nothing more than his own freedom!” — JOHN PAUL II: *Encyclical Letter “Veritatis splendor”* (August 6, 1993) [henceforth: VS], no. 46.

of the integral and referring to the “beginning”<sup>31</sup> *de persona humana* teaching.<sup>32</sup>

What proves that fact that the Pope-teacher of personalism understood it perfectly well are, for instance, the memorable fragments of the *Encyclical “Veritatis splendor”*: “It is in the light of the dignity of the human person — a dignity which must be affirmed for its own sake — that reason grasps the specific moral value of certain goods towards which the person is naturally inclined. And since the human person cannot be reduced to a freedom which is self-designing, but entails a particular spiritual and bodily structure, the primordial moral requirement of loving and respecting the person as an end and never as a mere means also implies, by its very nature, respect for certain fundamental goods, without which one would fall into relativism and arbitrariness.”<sup>33</sup> Let us add that Héctor Franceschi rightly refers this papal magisterium to the relation between the freedom and inseparability of marriage, and consistently to establishing a marriage-family bond.<sup>34</sup>

These remarks make it possible to develop the previously submitted doubts; what is more, the undertone of the consecutive passages of the above-mentioned 1986 speech becomes completely intelligible. What does this real cooperation within the field of civil and church legislation activity for the family and its rights consist in? — the Pope asks. The answer comes immediately: it is impossible to narrow down the rights of the family to exclusively spiritual or religious issues; nothing more wrong (!). The church proclamation of these rights refers to the rudiments of the social order on the fundamental level, where the very roots of a given person’s identity are influenced.<sup>35</sup> It is true that the Church, by promoting the fundamental values of the family *communio personarum*, fulfils its own mission. However, it is also true that the same obligation of protecting these values and rights, which constitute the vital component of

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<sup>31</sup> See K. WOJTYŁA: *Love and Responsibility*. Trans. H.T. WILLETTTS. New York 1981; JOHN PAUL II: *Man and Woman He created Them. A Theology of the Body* 1,2-4. Trans. M. WALDSTEIN. Boston 2006.

<sup>32</sup> See GS, nos. 47—52.

<sup>33</sup> VS, no. 48.

<sup>34</sup> Cf. H. FRANCESCHI: “Valori fondamentali del matrimonio nella società di oggi: indissolubilità.” In: *Matrimonio canonico e realtà contemporanea*. Studi Giuridici. Vol. 68. Città del Vaticano 2005, pp. 220—221.

<sup>35</sup> Code of Canon Law (promulgated January 25, 1983), can. 747 § 2: “It belongs to the Church always and everywhere to announce moral principles, even about the social order, and to render judgment concerning any human affairs insofar as the fundamental rights of the human person or the salvation of souls requires it”; cf. also Code of Canons of the Eastern Churches (promulgated October 18, 1990), can. 595 § 2.



the inherent goods of marriage, is incumbent upon the civil authorities.<sup>36</sup> Therefore — let us conclude after John Paul II — it becomes obvious that by defending the Christian vision of marriage and the family, the Church at the same time constructs and strengthens the civil community with durable and stable moral order bonds.<sup>37</sup>

If we assume that the family ethos constitutes the foundation of the entire social ethos, then it is worth to follow Pope Wojtyła's train of thought, which in the discussed speech also aims at reminding that at the beginning of the marriage and family communion lies a disinterested gift of a person,<sup>38</sup> so the realization of the "personalistic norm"<sup>39</sup> ethos. That is the aim of referring, at the end of the speech, no longer only to the exhortation *Familiaris consortio*, but also to the Charter of the Rights of the Family (CRF).<sup>40</sup> Within this doctrinal context, what the Holy Father regarded as particularly important to emphasize is the right and duty of parents to give education. Referring to the conciliar magisterium the Pope states that: "This role in education is so important that only with difficulty can it be supplied where it is lacking. Parents are the ones who must create a family atmosphere animated by love and respect for God and man, in which the well-rounded personal and social education of children is fostered. Hence the family is the first school of the social virtues that every society needs."<sup>41</sup> And if so, both Antoni Stankiewicz<sup>42</sup> and

<sup>36</sup> JOHN PAUL II: *Discorso ai partecipanti al VI Colloquio...*, no. 4. "Il destino della comunità umana è strettamente legato alla sanità dell'istituzione familiare. Quando, nella sua legislazione, il potere civile disconosce il valore specifico che la famiglia retamente costituita porta al bene della società, quando esso si comporta come spettatore indifferente di fronte ai valori etici della vita sessuale e di quella matrimoniale, allora, lungi dal promuovere il bene e la permanenza dei valori umani, favorisce con tale comportamento la dissoluzione dei costumi" — *ibidem*.

<sup>37</sup> *Ibidem*, no. 3. "Infatti, l'adesione dei fedeli alla dottrina della Chiesa circa il matrimonio e la famiglia contribuisce efficacemente a far sì che tra i componenti di una comunità regnino quelle virtù morali, che rendono possibile la giustizia e cioè la fedeltà, il rispetto della persona, il senso di responsabilità, la comprensione vicendevole, l'aiuto reciproco" — *ibidem*.

<sup>38</sup> Cf. GrS, no. 14.

<sup>39</sup> "A person is a good towards which the only proper and adequate attitude is love" — K. WOJTYŁA: *Love and Responsibility...*, p. 41.

<sup>40</sup> HOLY SEE: Charter of the Rights of the Family (October 22, 1983) — [http://www.vatican.va/roman\\_curia/pontifical\\_councils/family/documents/rc\\_pc\\_family\\_doc\\_19831022\\_family-rights\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html) (accessed: 30.6.2014).

<sup>41</sup> VATICAN COUNCIL II: *Declaration on Christian Education* "Gravissimum educationis", no. 3,1; JOHN PAUL II: *Discorso ai partecipanti al VI Colloquio...*, no. 5.

<sup>42</sup> The canonist quotes, among others, an important passage of the 2001 address to the Roman Rota, in which John Paul II teaches: "It is necessary to bear in mind the principle that *juridical significance* is not juxtaposed as something foreign to the *interpersonal reality* of marriage, but constitutes a *truly intrinsic dimension* of it. Relations

Salvatore Berlingò<sup>43</sup> are right, when they, by referring to the signs of times, emphasize — in the constitution of marriage and family — the structural (ethical) role of the principle of love. Berlingò additionally raises an issue of the meaning of the Preamble E of the CRF, in which we read: “[...] the family constitutes, much more than a mere juridical, social and economic unit, a community of love and solidarity, which is uniquely suited to teach and transmit cultural, ethical, social, spiritual and religious values, essential for the development and well-being of its own members and of society.”<sup>44</sup>

It is not difficult to notice that the quoted important standard of the Charter not only points to the very family *ethos*, but also to its *logos*. It is not of no importance. This, characteristic in the Holy See document connection of the above mentioned orders needs to be accepted as the ideological structure of the normative criteria, defining the conditions of an authentic execution of the child’s rights to be raised in a family, evoked in the title of this study. What reassures us is John Paul II’s well-known statement derived from no. 17 of the *Letter to Families “Gratissimam sane”* (1994): “The rights of the family *are not simply the sum total* of the rights of the person, since the family is *much more* than the sum of its individual members. It is a community of parents and children, and at times a community of several generations. For this reason its ‘status as a subject’, which is grounded in God’s plan, gives rise to and calls for certain proper and specific rights [...] on the basis of the moral principles.”<sup>45</sup>

The question formulated in the same number of the *Gratissimam sane*: “What does the family as an institution expect from society?,”<sup>46</sup> with

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between the spouses, in fact, like those between parents and children, are constitutively *relations of justice*, and for that reason have in themselves juridical significance. Married and parent-child love is not merely an instinctive inclination, nor an arbitrary and reversible choice, but *is rather a love that is due*” — [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/speeches/1997/documents/hf\\_jp-ii\\_spe\\_19970127\\_rota-romana\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/speeches/1997/documents/hf_jp-ii_spe_19970127_rota-romana_en.html) (accessed 30.6.2014); A. STANKIEWICZ: “Familia e filiazione...,” pp. 188—189.

<sup>43</sup> Ibidem, p. 122.

<sup>44</sup> GrS, no. 17. further we read: “The Charter of the Rights of the Family, on the basis of the moral principles mentioned above, consolidates the existence of the institution of the family in the social and juridical order of the ‘greater’ society — those of the nation, of the State and of international communities. Each of these ‘greater’ societies is at least indirectly conditioned by the existence of the family. As a result, the definition of the rights and duties of the ‘greater’ society with regard to the family is an extremely important and even essential issue” — ibidem.

<sup>45</sup> Ibidem.

<sup>46</sup> The crucial passages of the CRF must not be overlooked: “The Charter is addressed principally to governments. In reaffirming, for the good of society, the common awareness of the essential rights of the family, the Charter offers to all who share responsibility for the common good a model and a point of reference for the drawing up of legis-

a simultaneous indication toward the CRF — sufficiently explains why the Holy See (the author of this document) explicitly makes the state authorities the addressee<sup>47</sup> of the declared<sup>48</sup> rights. It is precisely the state authorities that the main responsibility for the protection of “family sovereignty”<sup>49</sup> rests upon, since this “family” — ingrained in the creation order and with *eo ipso* status<sup>50</sup> — constitutes the fundamental nucleus of the social fabric.<sup>51</sup> On the other hand the conclusions that emerge from the sovereignty principle<sup>52</sup> seem to be obvious: “In the conviction that the good of the family is an indispensable and essential value of the civil community, the public authorities must do everything possible to ensure that families have all those aids — economic, social, educational, political and cultural assistance — that they need in order to face all their responsibilities in a human way.”<sup>53</sup>

It goes without saying that among the mentioned missions of the family the most vital one is the mission of upbringing<sup>54</sup> — according to a par-

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lation and family policy, and guidance for action programmes” — PONTIFICAL COUNCIL FOR THE FAMILY: Charter of the Rights of the Family. Introduction — [http://www.vatican.va/roman\\_curia/pontifical\\_councils/family/documents/rc\\_pc\\_family\\_doc\\_20001115\\_family-human-rights\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20001115_family-human-rights_en.html) (accessed 30.6.2014). This *ad extra* CRF value is aptly recognized by Paolo Bianchi, who writes: “Tale ‘Carta’ [...] concerne più propriamente i diritti dell’istituto familiare, da tutelare e da promuovere — come risulta dal contesto e dai suoi destinatari principali, i Governi — nell’ambito della società civile e della sua organizzazione politica” — P. BIANCHI: “Il ‘diritto di famiglia’ della Chiesa.” *Quaderni di Diritto Ecclesiale*, 1994, vol. 7, p. 285; see more — D. MARTIN: “La Carta dei Diritti della Famiglia: le sue origini e la sua originalità.” In: *La famiglia e i suoi diritti nella comunità civile e religiosa*. Roma 1987, pp. 99—107.

<sup>47</sup> The foundation of the rights of the family mentioned in the CRF is in the order of creation; cf. FC, no. 46.

<sup>48</sup> GrS, n. 17; cf. P.J. VILADRICH: “La famiglia sovrana.” *Ius Ecclesiae*, 1995, vol. 7, pp. 539—550; W. GÓRALSKI: “Family as a sovereign institution.” In: *Sovereign Family. Ecumeny and Law*, 2014, vol. 2, pp. 91—104.

<sup>49</sup> Cf. GrS, no. 17.

<sup>50</sup> PONTIFICAL COUNCIL FOR THE FAMILY: *The Family and Human Rights* (December 9, 1999), no. 71 — [http://www.vatican.va/roman\\_curia/pontifical\\_councils/family/documents/rc\\_pc\\_family\\_doc\\_20001115\\_family-human-rights\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20001115_family-human-rights_en.html) (accessed 30.6.2014).

<sup>51</sup> Cf. A. PASTWA: “The Right to Found a Family and the Right to Parenthood. Remarks on Articles 2 and 3 of the Charter of the Rights of the Family.” In: *Sovereign Family. Ecumeny and Law*, 2014, vol. 2, pp. 183—186.

<sup>52</sup> FC, no. 45.

<sup>53</sup> “The right and duty of parents to give education is essential, since it is connected with the transmission of human life; it is original and primary with regard to the educational role of others, on account of the uniqueness of the loving relationship between parents and children; and it is irreplaceable and inalienable, and therefore incapable of being entirely delegated to others or usurped by others” — FC, no. 36.

<sup>54</sup> PONTIFICAL COUNCIL FOR THE FAMILY: *The Family and Human Rights*. 6.2: *The Family, First Educator*, nos. 67—70.

adigm formulated by the Catholic Church: “the family, first educator.”<sup>55</sup> It is an area in which it is explicitly visible, why the proclamation of the “family sovereignty,” in the church documents, is — invariably — accompanied by the affirmation of the subsidiarity principle. It is worth taking into account the voice of Cardinal Camillo Ruini, who in the introduction to the book *La famiglia soggetto sociale: radici, sfide, progetti* remarks that the Catholic Church — by a translation of the main *Familiaris consortio* concepts into a normative language — applies in the CRF “principles” and “articles” a basic criterion normalizing the subject relations between the state and the family. “The State must recognize that ‘the family is a society in its own original right’ and so society is under a grave obligation in its relations with the family to adhere to the principle of subsidiarity.”<sup>56</sup> The meaning of this principle within the subject context is explained in the *Gratissimam sane* section of the proclamation, which states that the family belongs to the soul of every state: “the family [...] is connected with the State precisely by reason of the *principle of subsidiarity*. Indeed, the family is a social reality which does not have readily available all the means necessary to carry out its proper ends, also in matters regarding schooling and the rearing of children. The State is thus called upon to play a role in accordance with the principle mentioned above. Whenever the family is self-sufficient, it should be left to act on its own; an excessive intrusiveness on the part of the State would prove detrimental, to say nothing of lacking due respect, and would constitute an open violation of the rights of the family. Only in those situations where the family is not really self-sufficient does the State have the authority and duty to intervene.”<sup>57</sup>

<sup>55</sup> FC, no. 45; “Questo principio della Dottrina sociale della Chiesa implica che lo Stato riconosca il ruolo e la titolarità della famiglia in tutti quegli ambiti in cui sono in gioco i suoi diritti primari e inalienabili” — C. RUINI: “Introduzione — La Chiesa italiana e la famiglia.” In: *La famiglia soggetto sociale: radici, sfide, progetti*. Eds. L. SANTOLINI, V. SOZZI. Roma 2002, p. 16; see more — P. DONATI: “La famiglia come soggetto sociale: ragioni, sfide, programmi.” In: *La famiglia...*, pp. 33—68.

<sup>56</sup> GrS, no. 17.

<sup>57</sup> Considering the aspectuality of this proposal, this standard is the one which deserves the closest attention.

## Implementation of the standards of the Convention on the Rights of the Child within the Domestic Context (November 20, 1989)

On November 20, 1989 the General Assembly of the United Nations passed Convention on the Rights of the Child (CRC) — the first in the world and up to this day the most important legal document promoting the protection standards of the youngest members of the society. According to the regulations stipulated by this document, a child is an independent entity, which has its own identity, dignity and the right to privacy. Nonetheless, because of its physical and mental immaturity it requires special care and protection. Here the Convention keynote idea does not leave room for doubt — the latter shall be guaranteed by the state, however, always (!) taking into consideration the observance of the family's autonomy. A family, in which both parents aim at securing the well-being of their offspring, constitutes the optimum environment for the child's development. Precisely — to formulate it negatively — the state must not arbitrarily deputize for parents in upbringing and usurp the rights within this scope. On the other hand, in a positive depiction — a key importance standard of the Convention is the right to be raised in a family and to maintain contact with both parents.<sup>58</sup> This standard is complemented by two different ones: the right to alternative care, in an instance of the lack of possibility of upbringing in a family and the right of adoption.

Bringing the matter to its essence: three CRF articles guard the right to be raised in a family. The fundamental principle of this central standard of the Convention was expressed in its Art. 5: "States Parties shall respect the responsibilities, rights and duties of parents [...] to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."<sup>59</sup> Equally important normative contents is rendered by the articles 9 and 18 of CRC. The right of a child to family<sup>60</sup> puts forward a requirement, which suggest that a child, for reasons contrary to

<sup>58</sup> UNITED NATIONS: Convention on the Rights of the Child (November 20, 1989) [henceforth: CRC] — <http://www.un.org/documents/ga/res/44/a44r025.htm> (accessed 30.6.2014); see a good commentary S. DETRICK: *A Commentary on the United Nations Convention on the Rights of the Child*. The Hague 1999, pp. 115—124. Is consonant with this principle article 14, n. 2 of CRC: "States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child."

<sup>59</sup> The right of a child to be raised by both parents, discussed here, is justifiably referred to in the reference books as "the right of a child to family" or the "right to live in a family."

<sup>60</sup> See also CRC, Art. 10.

his well-being, should not be separated from the parents, and should the necessity arise — the regular contact with father or/and mother be guaranteed for the child. The applied regulations contain Art. 9: “States Parties shall ensure that a child shall not be separated from his or her parents against their will [...]” (no. 1). “States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents [...]” (no. 3).<sup>61</sup> In turn the content of the parental responsibility is defined by Art.18, which states that “both parents have common responsibilities for the upbringing and development of the child [...] [and — A.P.] the best interests of the child will be their basic concern” (no. 1).” “For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents [...]” (no. 2).

This significant, defined in such a way, standard of the Convention (the right to be raised in a family) is completely realized<sup>62</sup> within the Polish law.<sup>63</sup> It is sufficient to quote a norm proper for this matter of the Constitution of the Republic of Poland,<sup>64</sup> namely Art. 48 § 2: “Limitation or deprivation of parental rights may be effected only in the instances specified by statute and only on the basis of a final court judgment.” Equally convincing are the regulations of the Family and Guardianship Code,<sup>65</sup> like the one in article 93 § 1: “parental authority applies to both parents,” or these in article 97 “[...] each of them is entitled and obliged to exercise that authority” (§ 1); “[...] on important matters the parents of the child decide on matters together; if there is no agreement between them, the

<sup>61</sup> T. SMYCYŃSKI: “Czy jest potrzebna Konwencja o prawach dziecka? Geneza i funkcje Konwencji.” In: *Prawa dziecka...*, pp. 17, 9—17; A.N. SCHULTZ: “O Konwencji o prawach dziecka i o jej wpływie na prawo polskie.” In: *Prawa dziecka...*, pp. 68, 59—79; M. ŁĄCZKOWSKA: “Instytucjonalna ochrona praw dziecka w Polsce.” In: *Prawa dziecka...*, pp. 94—95, 89—106.

<sup>62</sup> See *Konwencja o prawach dziecka a prawo polskie*. Ed. A. ŁOPATKA. Warszawa 1991; *Konwencja o prawach dziecka: analiza i wykładnia*. Ed. T. SMYCYŃSKI. Poznań 1999; *Prawa dziecka. Konteksty prawne i pedagogiczne*. Ed. M. ANDRZEJEWSKI. Poznań 2012.

<sup>63</sup> *Konstytucja Rzeczypospolitej Polskiej*, April 2, 1997. Dz.U.1997.78.483 (English version — <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (accessed 30.6.2014)).

<sup>64</sup> Ustawa z dnia 25 lutego 1964 r. *Kodeks rodzinny i opiekuńczy* [henceforth: KRO]. Dz.U.1964.9.59 z późn. zm. (English version — *The Family and Guardianship Code. Kodeks rodzinny i opiekuńczy*. Trans. N. FAULKNER. Warszawa 2010).

<sup>65</sup> Art. 1131 of KRO regulates the principles of access: “If the child lives permanently with one parent, the way of maintaining contact with the child is specified by the parents jointly, based on the welfare of the child and taking into account his/her reasonable wishes; in the absence of an agreement settled by the guardianship court (§ 1).” “The provisions of § 1 will apply accordingly if the child does not live with either of his/her parents and is cared for by a guardian or has been placed in foster care or in institutional care (§ 2).”



guardianship court will decide” (§ 2). What do the detailed precepts of the Code say? If the parents remiss or overuse in their parental authority, then the court is entitled to: limit their authority (Art. 107), suspend it, in the presence of a temporary impediment in wielding authority (article 110 § 1), and finally, it is possible in the last resort to deprive the parents of the authority (Art. 111 § 1).

Such situations usually cause limitation of the contact with a child,<sup>66</sup> if required for the child’s welfare (Art. 1132 § 1). In turn “if maintaining contact between parents and the child seriously endangers or violates the child’s welfare, the court will prohibit contact” (Art. 1133).

In connection with the last regulation it is worth quoting a fragment of the judicial opinion of the Polish Supreme Court of November 7, 2000 (I CKN 1115/00): “To deprive parents of personal contact with the child can be adjudicated exclusively under specific circumstances, e.g. when maintaining personal contacts between the parents and the child jeopardizes the child’s life, health, security, or has a corrupting influence over the child.”<sup>67</sup>

As regards the remaining two standards of child’s protection, the right to alternative care, in case of a lack of possibility to be raised in family, is expressed in Art. 20 of CRC: “A child temporarily or permanently deprived of his or her family environment [...] shall be entitled to special protection and assistance provided by the State (Art. 20,1); States Parties shall [...] ensure alternative care for such a child (article 20,2).”<sup>68</sup> In turn the third standard, which allows to perceive adoption as a means of realizing the right of a child to family,<sup>69</sup> is regulated by article 21 of CRC (specified in 5 points).<sup>70</sup>

<sup>66</sup> “Disallowing personal parent-child contact can be adjudged under certain circumstances, e.g. when such a contact between the parents and the child constitutes a threat to the child’s life, health, safety, or has a corruptive influence on the child.” Orzecznictwo Sądu Najwyższego — Izba Cywilna 2001, nr 3, poz. 50 — <http://prawo.lego.pl/prawo/i-ckn-1115-00/> (accessed 30.6.2014) (trans. — A.P.).

<sup>67</sup> See S. DETRICK: *A Commentary on the United Nations Convention...*, pp. 330—340; see also other relevant international instruments: European Convention on the Adoption of Children (March 24, 1967) (in Polish legal system — Dz.U.1999.99.1157); Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993 (Dz.U. 2000.39.448).

<sup>68</sup> Cf. J. PANOWICZ-LIPSKA: “Przysposobienie dziecka.” In: *Konwencja o prawach dziecka...*, pp. 201—202, 199—227.

<sup>69</sup> It is worth noticing that the introduction to this article invokes the principle of the “child’s well-being” (“the best interests of the child”): “States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall”; see S. DETRICK: *A Commentary on the United Nations Convention...*, pp. 341—360. About the principles, which constitute the basis of CRC — A.N. SCHULTZ: “O Konwencji o prawach dziecka...” pp. 63—68.

<sup>70</sup> See M. MACHINEK: “The Charter of the Rights of the Family and the Yogyakarta Principles. Two Worlds.” *Ecumeny and Law*, 2014, vol. 2, pp. 33—48.

Naturally, as it was already stated, similar regulations can be found in the Polish legal system. Article 72 § 2 of the Polish Constitution stipulates: “A child deprived of parental care shall have the right to care and assistance provided by public authorities.” In turn, in the Family and Guardianship Code: article 109 § 2 standardizes the detailed issue of taking the minor into foster care, whereas articles 112—127 systemically regulate such issues as: the custody over children (placed in foster care or institutional care) and adoption.

The 1989 Convention standards, described briefly here and dedicated to the right of a child to upbringing in a family, undeniably constitute a crucial reference point for the domestic legislator. However, it is important to remember that a characteristic feature of the international law standards (binding for countries which ratified them) — similarly as legal acts of lesser legal force, like: recommendations or resolutions, is their conciseness, condensation, but also a peculiar terseness “justified” by the means of reference to the minimum of common idea of contemporary family relationship, equality of women and men, family autonomy, rights of individual especially weaker party, namely a child. This impartial permanent situation is connected with such advantages as, for example leaving a subject matter freedom margin for a given country legislator: maintaining or passing detailed normative solutions coherent with the state law. However, today it is also not difficult to notice disadvantages: especially the underspecification — in the name of the outlook pluralism principles — the axiological plane of the accepted standards (and precisely, avoiding what we called the logos and ethos of the institutions of matrimony and family). In practice it can signify forcing a legal thought alien in a given culture and bear all stamps of a bad lobbying (it is not necessary to add that nowadays we are witnessing an aggressive lobby for the idea of *gender*<sup>71</sup>).

Three examples make it possible — in my opinion — to explicitly demonstrate what we are concentrating here on. What will support us here, I believe, is a constructive *modus operandi*, and precisely every time the appointing of convention standards will be accompanied by an invocation of pertinent CRF standards:

### Example 1

It is worth reminding that a famous Polish scholar Professor Tadeusz Smyczyński, director of the Centre for Family Law and Children’s Rights at the Institute of Law Studies of the Polish Academy of Sciences, an

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<sup>71</sup> See M. MACHINEK: “The Charter of the Rights of the Family and the Yogyakarta Principles. Two Worlds.” *Ecumeny and Law*, 2014, vol. 2, pp. 33—48.

expert of both chambers of the Polish Parliament, created, as part of the activity of the Centre, a project of a document, which became the starting point for the work on the 1989 Convention. This outstanding lawyer, a family law expert, is the author of a study entitled “The right of the child to be raised in a family” (*Prawo dziecka do wychowania w rodzinie*).<sup>72</sup> In the study the author elevates, among others, the virtue of a principle, quoted in no. 18 of CRC, which states that “both parents have common responsibilities for the upbringing and development of the child.” In the above-mentioned study we read: “The right of the child to family means a right to the contact with both the father and the mother, regardless of the fact whether they are spouses and whether the child is illegitimate or not.”<sup>73</sup> However, Professor Smoczyński promptly adds: “I have no doubt, though, the child must be protected against the environment of a unisexual pair of people. First of all, such relationship does not constitute a family, but is some form of people’s existence, whose sex life will never bear fruit in the shape of a child.”<sup>74</sup>

At the same time it should be highlighted that what gives a strong base for the expert’s constataion are two passages of the CRF Preamble: the family is based on marriage, that intimate union of life in complementarity between a man and a woman, which is constituted in the freely contracted and publicly expressed indissoluble bond of matrimony and is open to the transmission of life (Preamble B); marriage is the natural institution to which the mission of transmitting life is exclusively entrusted (Preamble C). The words of the Congregation for the Doctrine of the Faith of 2003 — curiously enough, with the evocation of the universal idea of the CRC — are also characteristic for this context: “As experience has shown, the absence of sexual complementarity in these unions creates obstacles in the normal development of children who would be placed in the care of such persons. They would be deprived of the experience of either fatherhood or motherhood. Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children, in the sense that their condition of dependency would be used to place them in an environment that is not conducive to their full human development. This is gravely immoral and in open contradiction

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<sup>72</sup> What proves the importance of the voice of the Polish expert is the fact the this study was placed on the website of the Commissioner for Children’s Rights — T. SMYCZYŃSKI: “Prawo dziecka do wychowania w rodzinie” — <http://brpd.gov.pl/aktualnosc/prawo-dziecka-do-wychowania-w-rodzinie> (accessed: 30.6.2014) (*nota bene* the author gave the same title to yet another article — “Prawo dziecka do wychowania w rodzinie.” In: *Konwencja o prawach dziecka...*, pp. 149–165).

<sup>73</sup> Ibidem, no. I,5

<sup>74</sup> Ibidem.

to the principle, recognized also in the United Nations Convention on the Rights of the Child, that the best interests of the child, as the weaker and more vulnerable party, are to be the paramount consideration in every case.”<sup>75</sup>

Hence, the expert’s harsh tone of voice should not come as a surprise: “It is unnecessary to [...] possess any specialist knowledge to claim that for a proper and balanced development of personality, a child needs both a masculine and a feminine exemplar. Therefore, the legislator favours adoption by spouses, rather than by a single person. The consent in the name of the law, in many European countries, to the adoption by homosexuals (lesbians) is a scandal and a gross infraction of the child’s rights (Art. 3 of CRC), and especially the right to be raised in a family. Let me just point to the fact that the above-mentioned precept stipulates that in every undertaken activity the best interest of the child must be protected. It turns out that surrendering to the egoistic demands and interests of the homosexual circles is for some parliaments more important than the well-being of a child. How do the organizations that guard the rights of a child, including the Committee on the Rights of the Child in Geneva, react?” — Tadeusz Smyczyński asks rhetorically.<sup>76</sup>

## Example 2

The same expert remarks that in an instance of difficulties related to a proper execution by a family of its obligations towards the child, the family should be offered help first (the principle of subsidiarity<sup>77</sup>). “Separating the child from its natural family should be the ultimate measure, undertaken only when the parents pose a threat to the child.”<sup>78</sup>

In an obvious way this standpoint, in consonance with one of the seven key principles (which the Holy See promotes as an authentic perspective of the rights and duties of the child), was evoked in the recent Holy See’s Periodic Report on the CRC: “full respect of the child’s rights and duties require special protection and promotion of the family’s rights and duties.”<sup>79</sup> The CRF once again touches upon the crux of this trouble-

<sup>75</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH: *Considerations regarding proposals to give legal recognition to unions between homosexual persons* (June 3, 2003), no. 7 — [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20030731\\_homosexual-unions\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html) (accessed 30.6.2014).

<sup>76</sup> T. SMYCZYŃSKI: “Prawo dziecka...,” no. I, 5.

<sup>77</sup> M. ANDRZEJEWSKI: *Pomocnicza rola państwa w świetle Konwencji o Prawach Dziecka i prawa polskiego*. In: *Współczesne kierunki w opiece nad dzieckiem. Wybór tekstów*. Ed. Z.W. STELMASZUK. Warszawa 1999, pp. 94–113.

<sup>78</sup> T. SMYCZYŃSKI: *Prawo dziecka...*, no. I, 1.

<sup>79</sup> S. TOMASI: *Presentation of the Periodic Reports of the Holy See to the Committee on the Convention of the Rights of the Child and the Optional Protocols*. Geneva, January

some legal matter, this time in Art. 3c: “The family has a right to assistance by society in the bearing and rearing of children. Those married couples who have a large family have a right to adequate aid and should not be subjected to discrimination.”

Precisely, it is right to agree with Tadeusz Smoczyński, who claims that the “reform of the family support system in Poland seems to be realizing this postulate.” To illustrate the validity of this thesis, it is worth evoking the introduction (resembling a preamble) to the Act of June 9, 2011 on the support of family and the fosterage system where we read:

For the well-being of children, who need particular protection and support from adults, family environment, the atmosphere of happiness, love and understanding, concerned for their harmonious development and future life independence, for assuring the protection of their rights and liberties, for the well-being of family, which is the elementary unit of the society and a natural environment for the development and well-being of all of its members, especially children, convinced that an effective support for a family that encountered difficulties caring for and upbringing children and an effective protection of children and help offered them can be achieved through a cooperation of all people, institutions and organizations working with children and parents — it is resolved as follows.<sup>80</sup>

It has to be noticed that articles 1, 8 and 9 of this legal act confirm the legislator’s intention to implement the not so long ago presented ideological assumptions.<sup>81</sup>

### Example 2

In the last example, contrary to the previous ones, Tadeusz Smoczyński’s opinion can be shared only partially. He notices the virtues of the European Convention on Contact Concerning Children passed in Strasbourg,

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16, 2014 — [http://www.vatican.va/roman\\_curia/secretariat\\_state/2014/documents/rc-seg-st-20140116\\_tomasi-child-rights\\_en.html](http://www.vatican.va/roman_curia/secretariat_state/2014/documents/rc-seg-st-20140116_tomasi-child-rights_en.html) (accessed 30.6.2014).

<sup>80</sup> Ustawa z dnia 9 czerwca 2011 r. O wspieraniu rodziny i systemie pieczy zastępczej. Dz.U.2011.149.887 (trans. — A.P.)

<sup>81</sup> Art. 1 of the act defines: “1) principles and forms of supporting a family which undergoes difficulties in fulfilling guardianship and educational functions; 2) principles and forms of exercising fosterage care and helping the of-age foster children become independent; 3) the assignments of public administration within the scope of supporting family and the fosterage system; 4) the rules of financing the family and fosterage system support; 5) assignments within the scope of adoption procedures.” In turn, articles 8 and 9 of the act (in chapter 2 entitled “Supporting Family”) regulate the issues of helping a family which faces difficulties in fulfilling its guardianship and educational functions.

May 15, 2003,<sup>82</sup> calling for — according to the expert<sup>83</sup> — a fast ratification process of this legal act in our country. Two arguments were put forward. The first one, an entirely just broadening of the scope of the notion of child's contacts: beyond the circle of immediate family, i.e. parents (like in the Polish law); this notion should also span different people who developed a family bond with the child. The matter concerns the protection of child's feelings toward, for instance, grandparents, siblings, relatives or other people with whom the child has a true emotional bond. Let us add that the author evokes a precedential Supreme Court ruling, which recognized the right of the grandparents to personal contacts with the child (in spite of a resistance of one of the parents), when such contacts serve the well-being of a child.<sup>84</sup> The Polish expert notices the second value of the project of the convention in the normalization of the cross-border contacts and preventing the use of the contact with the child, by one of the parents, to destabilize the child's situation ruled by the court.<sup>85</sup>

However, the arguments of this and other experts from the Lower Chamber of the Parliament were not enough to guarantee the ratification of the act by the means of the highest Polish authority. President Professor Lech Kaczyński did not sign the Act dated October 23, 2008, on Ratification Convention on Contact concerning Children. Strasbourg, May 15, 2003. In the justification of the refusal to sign the President argued: "The order to protect the well-being of a child constitutes an elementary and superior principle of the Polish family law system, in relation to which all other regulations within the scope of the contacts between parents and children should be subordinate. [...] According to article 25 it is prohibited to file, by the countries, any reservations toward the Convention. As a result, countries, which are to apply its solutions cannot connect the way of its usage with their legally binding system of values and traditions related to upbringing a child."<sup>86</sup> The refusal was for example motivated by the fact that "granting the Convention a status of a legally binding law

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<sup>82</sup> European Convention on Contact concerning Children, Strasbourg (May 15, 2003) — <http://conventions.coe.int/Treaty/en/Treaties/Html/192.htm> (accessed 30.6.2014).

<sup>83</sup> T. SMYCYŃSKI: "Prawo dziecka...", no. I,4.

<sup>84</sup> Uchwała Sądu Najwyższego z dnia 14 czerwca 1988 r. III CZP 42/88 — [http://www.i-kancelaria.pl/przydatne\\_informacje2/kontakty\\_dziadkow\\_z\\_wnukami\\_uchwala\\_sadu\\_najwyzszego\\_z\\_dnia\\_14\\_czerwca\\_1988\\_r\\_iii\\_czp\\_4288](http://www.i-kancelaria.pl/przydatne_informacje2/kontakty_dziadkow_z_wnukami_uchwala_sadu_najwyzszego_z_dnia_14_czerwca_1988_r_iii_czp_4288) (accessed 30.6.2014).

<sup>85</sup> T. SMYCYŃSKI: "Prawo dziecka...", no. I,4.

<sup>86</sup> PREZYDENT RZECZPOSPOLITEJ POLSKIEJ: *Odmowa podpisania ustawy z dnia 23 października 2008 r. "O ratyfikacji Konwencji w sprawie kontaktów z dziećmi, sporządzonej w Strasburgu w dniu 15 maja 2003 r."* (z uzasadnieniem), pp. 2—3 — [http://orka.sejm.gov.pl/Druk6ka.nsf/0/BA9F6A80266805DCC12575150046C9EB/\\$file/1442.pdf](http://orka.sejm.gov.pl/Druk6ka.nsf/0/BA9F6A80266805DCC12575150046C9EB/$file/1442.pdf) (accessed 30.6.2014).



seems to be at least premature, and moreover the results of its implementation can prove disadvantageous for family bonds. One of the fundamental values subject to the constitutional protection is the well-being of the family. The obligation of the legislator is striving for the provision of the stability of existing family relations, which enhances a correct development of underage children. It is the interest of children that has an immediate influence over the future of the family and it extorts defined rulings on the part of the public authority.”<sup>87</sup>

At the end of this justification the President strengthens his argumentation, by making use of the judgment of the Constitutional Tribunal<sup>88</sup>: “The necessity of securing the stability of a family determines a set of legal remedies, toward which the Constitutional Tribunal pointed in its ruling of November 12, 2002 [...] stating that ‘such a shape of the regulation is substantiated by the necessity to respect the unusually crucial, within the context of the norms related to marital status, principle of security and firmness of law. These principles have a particularly fundamental meaning for the stabilization of the family bonds, which cannot be disproved in a random way, in any conduct and time’.”<sup>89</sup>

Indeed, eventually — after implementing amendments — President Lech Kaczyński finally affixed his signature under the act on the ratification of the above-mentioned convention.<sup>90</sup> However, the quoted example makes us think; constitutes a good exemplification of the fact that the right of a child to family implies a particular autonomy of the latter one. All the external activities for the stabilization of the relations in the family should be characterized by the respect of the human rights within the scope of morals, tradition, culture and religion. Namely, in legal systems, in which the well-being of a child is treated par excellence as the well-being of the family and the society, the value especially promoted and protected — as it expressed by the *Apostolic Exhortation* “*Familiaris consortio*” — is “bringing up children in accordance with the family’s own traditions and religious and cultural values, with the necessary instruments, means and institutions.”<sup>91</sup>

A similar ideological message can be found in Art. 5 of CRF, the content of which, let us add, concludes well the remarks included here: “Since they have conferred life on their children, parents have the original, pri-

<sup>87</sup> Ibidem, s. 3.

<sup>88</sup> Wyrok z 12 listopada 2002 r. SK 40/01, OTK ZU nr 6/2002, poz. 81.

<sup>89</sup> PREZYDENT RZECZPOSPOLITEJ POLSKIEJ: *Odmowa podpisania ustawy...*, p. 3.

<sup>90</sup> Ustawa z dnia 23 kwietnia 2009 r. O ratyfikacji Konwencji w sprawie kontaktów z dziećmi, sporządzonej w Strasburgu w dniu 15 maja 2003 r. Dz.U.2009.68.576.

<sup>91</sup> JOHN PAUL II: *Apostolic Exhortation* “*Familiaris consortio*” (November 22, 1981), no. 46.

mary and inalienable right to educate them; hence they must be acknowledged as the first and foremost educators of their children: Parents have the right to educate their children in conformity with their moral and religious convictions, taking into account the cultural traditions of the family which favour the good and the dignity of the child; they should also receive from society the necessary aid and assistance to perform their educational role properly.”<sup>92</sup>

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It is not possible to talk about the rights of a child separately from the subject of family and the culture, tradition and values important in its environment. Such a clear message is included in the CRC Preamble, in its 5th and 6th paragraph: “Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community. Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.”

It is difficult to overestimate the value of this proclamation, constituting in its essence a universal (not only because of its scope) promotion of appropriate depictions of the rights of children. Indeed, the truth that the matter is related to a person rooted in the family should be reminded especially nowadays, when time after time tendencies to antagonize the relation between parents and children appear, mainly through evoking in an inappropriate way the rights of the latter ones.<sup>93</sup> Therefore, if we accept as an evident rule that the obligation to observe the conventional rights related to children rests upon countries, and the adults are responsible for the realization of this rights,<sup>94</sup> then the most desired activity of the country will always be an institutional support of the family with a view to securing a comprehensive protection of the rights of a child. All this in the name of a principle which states that the family is the basic unit of society and the natural environment for the growth and well-being of children.<sup>95</sup>

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<sup>92</sup> CRF, no. 5a.

<sup>93</sup> Cf. M. ŁĄCZKOWSKA: “Instytucjonalna ochrona praw dziecka...,” pp. 91—93.

<sup>94</sup> Cf. T. SMYCYŃSKI: “Legislacyjne podstawy ochrony dziecka.” In: *Polska dla dzieci. Ogólnopolski szczyt w sprawach dzieci. Materiały i dokumenty*. Eds. M. KACZMAREK, P. KIERENKO, Warszawa 2003, p. 47.

<sup>95</sup> CRC, Preamble.

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 ANDRZEJ PASTWA

## The Right of the Child to be Raised in a Family Around the Current Issues

### Summary

The article is initiated by a contemplation on the contemporary humanization mission of the family. “The family is the basic unit of society. It is the cradle of life and love, the place in which the individual ‘is born’ and ‘grows’” (*Christifideles laici* exhortation, no. 40). However, not all forms of family life serve the human humanization and participate in the development of the society. A family, in order to create the integral human well-being — and that is, in fact, what the humanization is about — should act in a manner respecting this set of goods and values which characterize it as a “community of life and love.” Among the missions of the family the most vital one is the mission of upbringing (according to a paradigm: “the family, first educator”). It is an area in which it is explicitly visible why the proclamation of the “family sovereignty,” in the church documents — especially in the Charter of the Rights of the Family (1983) — is invariably accompanied by the affirmation of the subsidiarity principle. The standards of the Convention on the Rights of the Child (1989), touched upon in the last chapter, constitute a crucial reference point for the domestic legislator: the right to be raised in a family and to maintain contact with both parents. However, it is important to remember that a characteristic feature of the international law standards (binding for countries that ratified them) — similarly as legal acts of lesser legal force, like: recommendations or resolutions, is their conciseness, condensation, but also a peculiar terseness “justified” by the means of a reference to the minimum of common idea concerning a contemporary family relationship, equality of women and men, family autonomy, rights of individual, especially weaker party, that is, a child. This impartial, permanent situation is connected with such advantages as, for example leaving a subject matter freedom margin for a given country legislator: maintaining or passing detailed normative solutions coherent with the state law. However, today it is also not difficult to notice disadvantages: especially the underspecification — in the name of the outlook pluralism principles — the axiological plane of the accepted standards (and precisely, avoiding what we called the logos and ethos of the institutions of matrimony and family). In practice it can signify forcing a legal thought alien in a given culture, or even bear all stamps of a bad lobbying. It is demonstrated — in the last part of the article — by the means of examples, which depict real problems with the implementation of the relevant conventional regulations in the national (Polish) law.

ANDRZEJ PASTWA

## Le droit de l'enfant d'être élevé dans une famille Au sein de la problématique actuelle

### Résumé

La réflexion sur la mission contemporaine d'une famille humaine ouvre le présent article. « Berceau de la vie et de l'amour, dans lequel l'homme "naît" et "grandit", la famille est la cellule fondamentale de la société » (Exhortation *Christifideles Laici*, n 40). Cependant, ce ne sont pas toutes les formes de la vie familiale qui servent à l'humanisation de l'homme et participent au développement de la société. Pour pouvoir créer le bien intégral de l'homme, la famille devrait agir d'une manière respectant cet ensemble de biens et de valeurs qui la définissent comme une « communauté de la vie et de l'amour ». Parmi tous les devoirs de la famille (selon le paradigme : « la famille, la première institutrice »), c'est la mission éducative qui occupe la première place. C'est dans ce domaine que l'on voit le plus clairement pourquoi la proclamation de « la souveraineté de la famille » est continuellement accompagnée dans les documents ecclésiastiques — notamment dans la Charte des Droits de la Famille (1983) — de l'affirmation du principe de subsidiarité. Présentés dans le dernier chapitre, les standards de la Convention relative aux droits de l'enfant (1989) qui sont de prime importance, c'est-à-dire le droit d'être élevé dans une famille et de rester en contact avec les deux parents, constituent un point de repère important pour le législateur d'un pays donné. Il ne faut pas quand même oublier que ce qui caractérise les normes du droit international que l'on analyse (il s'agit des normes réunissant les États qui les ont ratifiées), c'est la brièveté, la concision, mais aussi une certaine lapidarité « justifiée » par le fait qu'elle se réfère au minimum de visions communes concernant les relations familiales contemporaines, l'égalité de la femme et de l'homme devant la loi, l'autonomie de la famille, les droits de l'individu (surtout ceux qui sont plus faibles), etc. À cet état de choses objectif sont liés les côtés positifs, comme par exemple la possibilité permettant au législateur d'un pays donné de garder une marge de liberté conforme à la Convention : maintenir ou adopter des solutions normatives détaillées, homogènes avec le système du droit national. Mais il est aussi difficile aujourd'hui de ne pas remarquer les côtés négatifs : surtout le manque de précision — au nom des principes du pluralisme concernant la manière d'envisager le monde — du niveau axiologique des standards adoptés (et plus précisément, le fait d'omettre ce que l'on a appelé le logos et l'éthos de l'institution du mariage et de la famille). Dans la pratique, cela peut désigner l'appui d'une idée juridique qui est étrange au niveau culturel, ou voire porter toutes les marques d'un mauvais lobbying. Les exemples présentés dans la dernière partie de l'article mettent en évidence un tel état de choses en démontrant les problèmes réels liés à l'implémentation au droit national (polonais) des réglementations qui sont l'objet de la convention.

**Mots clés :** famille, droit de l'enfant d'être élevé dans une famille, souveraineté de la famille, principe de subsidiarité, Charte des Droits de la Famille, Convention relative aux droits de l'enfant

ANDRZEJ PASTWA

## Il diritto del bambino all'educazione in famiglia Intorno alla problematica attuale

### Sommario

L'articolo si apre con la riflessione sulla missione contemporanea di umanizzazione della famiglia. "Culla della vita e dell'amore, nella quale l'uomo «nasce» e «cresce», la famiglia è la cellula fondamentale della società" (Esortazione *Christifideles Laici*, n. 40). Tuttavia non tutte le forme di vita familiare giovano all'umanizzazione dell'uomo e partecipano allo sviluppo della società. Affinché possa creare il bene integrale dell'uomo la famiglia deve operare rispettando tale gruppo di beni e valori che la contraddistinguono come "comunità di vita e di amore". Tra i compiti della famiglia il posto principale è occupato dalla missione dell'educazione (secondo il paradigma: "la famiglia come prima educatrice"). È in quest'area che si vede meglio perché la proclamazione della "sovranità della famiglia" è accompagnata immutabilmente nei documenti ecclesiastici — specie nella Carta dei Diritti della Famiglia (1983) — dall'approvazione del principio di sussidiarietà. Standard presentati nell'ultimo capitolo della Convenzione sui diritti dell'infanzia (1989) di importanza primaria: il diritto all'educazione nella famiglia ed ai contatti con entrambi i genitori costituiscono un punto importante di riferimento per il legislatore nazionale. Occorre ricordare tuttavia che le norme del diritto internazionale trattate (vincolanti per gli stati che le hanno ratificate) sono caratterizzate dalla concisione, dalla sintesi e da una certa lapidarietà "giustificata" dal riferirsi alle idee comuni minime sui rapporti familiari contemporanei, sulla parità tra donna e uomo, sull'autonomia della famiglia, sui diritti dell'individuo, specialmente della parte più debole, ecc. A questo stato obiettivo delle cose sono legati aspetti positivi come ad esempio il fatto che al legislatore di un determinato stato venga lasciato un certo margine di libertà in tal campo: mantenere o accogliere soluzioni particolari normative coerenti con il sistema del diritto nazionale. Ma oggi è difficile non scorgere anche aspetti negativi: specialmente la mancanza di precisione nel definire — in nome dei principi del pluralismo sulla concezione del mondo — lo strato assiologico degli standard assunti (e concretamente, l'omissione di ciò che abbiamo chiamato *logos* e *ethos* delle istituzioni del matrimonio e della famiglia). In pratica può significare la forzatura del pensiero giuridico estraneo culturalmente o addirittura presentare tutti i tratti del lobbying negativo. Lo rendono evidente, nell'ultima parte dell'articolo, gli esempi che presentano i problemi reali di implementazione nel diritto nazionale (polacco) delle norme delle convenzioni in oggetto.

**Parole chiave:** famiglia, diritto del bambino ad essere educato nella famiglia, sovranità della famiglia, principio di sussidiarietà, Carta dei Diritti della Famiglia, Convenzione sui diritti dell'infanzia